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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PRESBYTERIAN CHURCH (U.S.A.), *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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May 29, 1998

Listing of Amici Curiae Submitting
this Brief in Support of Rachel Bauchman's
Petition for a Writ of Certiorari

Presbyterian Church (U.S.A.)
United Church Board for Homeland Ministries
of the United Church of Christ
The American Jewish Committee
Anti-Defamation League
General Conference of Seventh Day Adventists
Union of American Hebrew Congregations
Hadassah
Jewish Council for Public Affairs
Jewish Reconstructionist Federation
National Council of Jewish Women
National Organization for Women Foundation

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INTEREST OF *AMICI CURIAE*

Amici represent two broad assemblages of groups whose interests in this case are two sides of the same coin – mainstream church organizations and organizations whose mission is to oppose discrimination, including discrimination based upon religion.[1] Each

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1. The consents of the parties to the filing of this brief have been submitted contemporaneously to the Clerk of the Court. The *amici* have prepared this brief in support of Ms. Bauchman's Petition without the substantive or financial help of any party. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission (continued...)

amicus believes strongly in preserving religious freedom and in the Constitutionally mandated separation of church and state - especially in the field of public education. *Amici* support Rachel Bauchman's petition for a writ of certiorari because the Tenth Circuit has improperly construed this Court's precedents to be so muddled and unclear that they provide no meaningful guidance to the courts of appeals. As a result, the Tenth Circuit applied an *ad hoc* analysis that renders the Establishment Clause so amorphous as to undermine its efficacy. The Tenth Circuit's ruling presents a danger to mainstream religions wherever they find themselves a local minority, and a similar danger to minority groups everywhere. Individual statements of interest for each of the *amici curiae* are collected in an Appendix to this brief.

SUMMARY OF ARGUMENT

In *Wallace v. Jaffree*, Justice Powell warned that continued criticism of this Court's Establishment Clause jurisprudence "could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis." 472 U.S. 38, 63 (1985) (Powell, J., concurring). The Presbyterian Church (U.S.A.), the United Church Board for Homeland Ministries of the United Church of Christ, the American Jewish Committee, the Anti-Defamation League, the General Conference of Seventh-Day Adventists, the Union of American Hebrew Congregations, Hadassah, the Jewish Council for Public Affairs, the Jewish Reconstructionist Federation, the National Council of Jewish Women and the National Organization for Women Foundation, as *amici curiae*, urge this Court to grant Rachel Bauchman's petition for a writ of certiorari not only for the reasons set forth in Ms. Bauchman's petition, but also because the opinions of the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Utah have, as Justice Powell predicted, cast aside this Court's three-pronged Establishment Clause analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and

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1. (...continued)
of the brief.

replaced it with an *ad hoc*, "I know it when I see it," standard for assessing Ms. Bauchman's claims.

The Tenth Circuit Court of Appeals, in particular, openly expressed its disdain for this Court's Establishment Clause jurisprudence, which it called "muddled," "unworkable" and of "no useful guidance." *Bauchman v. West High School*, 132 F.2d 542, 551-52 (10th Cir. 1997). As a result, although the Tenth Circuit nominally structured its analysis around the "purpose," "effects" and "entanglement" prongs of the *Lemon* framework, its analysis under each prong departed dramatically from the manner in which this Court has applied that framework.

First, in applying the "purpose" prong of the *Lemon* analysis, the Tenth Circuit ignored numerous allegations that provided circumstantial support for Ms. Bauchman's claim that the Salt Lake City School District and one of its teachers had the actual purpose of favoring one religious belief over another. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989). Instead, the Tenth Circuit fashioned a new requirement that the purpose analysis must be supported by "concrete manifestations of intent" that are "temporally connected to the challenged activity." 132 F.3d at 560. That requirement is not supported by this Court's Establishment Clause cases, especially where the issue is the purpose of a teacher's improper conduct in public school classes attended by impressionable high school students. Moreover, the standard used by the Tenth Circuit provides would-be violators of the Establishment Clause with a virtual road map for committing such violations while avoiding any legal prohibition, simply by avoiding direct statements about the purpose of his or her actions at or around the time those actions occur.

Second, in applying the "effects" prong of the *Lemon* analysis, the Tenth Circuit did not assess whether the actions of school officials and Ms. Bauchman's teacher had the effect of advancing or inhibiting religion. In the past, this Court has used the effects analysis to assess activities that *seemingly* advance or inhibit religion, to determine

whether they may have "largely lost their religious significance over time," *County of Allegheny v. ACLU*, 492 U.S. at 631, or may be such that "a reasonable dissenter in this milieu could believe that the group exercise [did not] signif[y] her own participation or approval" of religion, *Lee v. Weisman*, 505 U.S. 577, 593 (1992). The Tenth Circuit, in contrast, applied an effects analysis that asked whether an observer steeped in local culture and history, and knowing that the Church of Jesus Christ of Latter Day Saints (the "LDS Church" or the "Mormons") comprised a majority of the local population, would be surprised by the alleged activities. This application of the effects standard virtually excludes consideration of minority interests from Establishment Clause analysis, instead giving prominence to the history, culture and context of a community's religious majority.

Third, in applying the "entanglement" prong of the *Lemon* analysis, the Tenth Circuit ignored Ms. Bauchman's allegations of religious strife resulting from the school's actions – allegations that, if proven at trial, would allow a fact-finder to determine that West High School has become excessively entangled with the community's religious institutions. *See Agostini v. Felton*, 117 S. Ct. 1997, 2015 (1997); *Lynch v. Donnelly*, 465 U.S. 668, 689 (1983) (O'Connor, J. concurring). The Tenth Circuit instead limited its "entanglement" analysis to "circumstances in which the state is involving itself with a recognized religious activity or institution." 132 F.3d at 556. This limitation allowed the Tenth Circuit to ignore Ms. Bauchman's allegations of religious strife and uphold the District Court's decision to deny Ms. Bauchman leave to amend her complaint.

The Tenth Circuit's truncated interpretation of each of the three prongs of this Court's *Lemon* framework departed from and significantly narrowed the application of this Court's Establishment Clause jurisprudence. The Tenth Circuit misused the complexities presented by this Court's Establishment Clause cases as license to conduct its own *ad hoc* analysis. *Lemon*, however, still provides the general principles that guide Establishment Clause analysis, *see Agostini v. Felton*, 117 S. Ct. at 2010, and remains this Court's only framework for assessing government action under the Establishment

Clause. Although that framework may have become somewhat "distorted" over the years, *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 721 (1994) (O'Connor, J., concurring in part and concurring in the judgment), the Tenth Circuit and the other Courts of Appeals should not be allowed to abandon the *Lemon* framework in favor of an amorphous, *ad hoc* assessment of government action. The Court should grant Ms. Bauchman's petition for a writ of certiorari to send a clear message to the Courts of Appeals and the District Courts that such *ad hoc* analyses are improper – especially where they result in a narrowing of Establishment Clause protection for students in the nation's primary and secondary schools. The posture of this case, arriving at this Court upon a denial of leave to amend that presents purely legal questions wholly divorced from any legitimate controversy over the facts alleged, provides a particularly appropriate opportunity for the Court to clarify the legal structure of a proper Establishment Clause analysis.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I.

THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S PURPOSE ANALYSIS, CONSTRUCTING ITS OWN, *AD HOC*, REQUIREMENTS FOR PLEADING AN IMPROPER PURPOSE UNDER THE ESTABLISHMENT CLAUSE.

In *Lemon v. Kurtzman*, this Court ruled that a government-sponsored program must have a secular purpose in order to be valid under the Establishment Clause. 403 U.S. at 612-13. Last Term the Court reaffirmed the "general principles" underlying *Lemon* and stated in particular that the Court "continue[s] to ask whether the government acted with the purpose of advancing or inhibiting religion." *Agostini v. Felton*, 117 S. Ct. at 1997. The Court reaffirmed that "the nature of [the purpose] inquiry has remained largely unchanged." *Id.*

In recent years, the Court has referred to the "actual" purpose of the government actors as the critical component of this analysis. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). "This secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is a 'sham.'" *Wallace v. Jaffree*, 472 U.S. at 64 (Powell, J., concurring); *accord Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) ("[A]n 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment.").

In the field of public education, this Court has expressed the need for particular vigilance so that "the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. at 584. The Court has characterized the need for vigilance in this area as part of the bond of trust between the families of public school students and the school system that provides family members with their education. *See id.* "That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Rachel Bauchman's complaints clearly allege actions that evidence a purpose by school authorities in Salt Lake City to advance the Mormon religion: Richard Torgerson, the teacher of Ms. Bauchman's Choir Class, engaged past Choir Classes in religious worship services, often at religious sites; had the Choir Class attended by Ms. Bauchman practice almost exclusively religious songs; and, in order to escape detection of what he knew was improper, sought to organize certain class members covertly in order to continue those past practices. [*See* Amended Complaint ("A.C.") ¶ 17(g); Complaint ("C.") ¶¶ 32, 34.] Torgerson allegedly advocated the Mormon religion in class, while stating he knew the law forbade him to do so. [*See* A.C. ¶ 16(h), (n), (o).] He asked his class to "accept"

the religious message of the songs he assigned. [*See id.* ¶ 16(l).] Torgerson also led the Choir Class in prayer and caused it to participate in religious services on a number of occasions. [*See id.* ¶ 16(e), (f), (k); *see also* C. ¶ 32.] All of these allegations support Ms. Bauchman's claim that Torgerson's purpose, and the purpose of the School officials who allowed him to continue these practices, was to promote religion in public high school classes.

In analyzing Ms. Bauchman's allegations, however, the Tenth Circuit cast aside all allegations related to prior conduct as irrelevant to the purpose inquiry and said the remaining allegations failed to satisfy the Tenth Circuit's newly-minted requirement of "objectively discernible conduct or communication that is temporally connected to the challenged activity and manifests a subjective intent by the defendant to favor religion or a particular religious belief." 132 F.3d at 560.[2] The Tenth Circuit could not cite any of this Court's cases – or any cases – that provided support for this new standard. In fact, the Tenth Circuit acknowledged that its purpose analysis did not even attempt to implement this Court's teachings on the subject:

> Having struggled to meaningfully apply the purpose component of the endorsement test to the alleged Establishment Clause violation in this case, we agree it is an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government

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2. In addition to applying the wrong legal standard, the Tenth Circuit also required Ms. Bauchman to plead her claims with a degree of specificity that this Court has said is not necessary to the assertion of a Constitutional or civil rights claim. *See Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting heightened pleading standard inconsistent with "notice pleading" standard of Fed. R. Civ. P. 8(a)); *see also Crawford-El v. Britton*, 66 U.S.L.W. 4311, 4316-17 (May 4, 1998) (rejecting heightened procedural standards for Constitutional claims that require proof of an improper purpose). Even if the Tenth Circuit had applied the proper substantive standards, their application of the wrong pleading standards alone would warrant the grant of Ms. Bauchman's petition.

> conduct goes against the grain of religious liberty the Establishment Clause is intended to protect.

132 F.3d at 552.

The Tenth Circuit's new standard casts aside the veil that separates the classroom from the sanctuary and instead openly grants public schools permission to advance religion, so long as the statements advancing religion are not accompanied by a contemporaneous and explicit admission that they are made for that purpose. Under the Tenth Circuit's standard, evidence that a purported secular purpose *was not* "sincere" or that it *was* a "sham," *see Wallace v. Jaffree*, 472 U.S. at 64 (Powell, J., concurring); *id.* at 75-76 (O'Connor, J., concurring), is irrelevant to the purpose inquiry, unless the evidence is contemporaneous with the government actions that allegedly supported religion. The Tenth Circuit's standard flouts this Court's rulings in a number of cases where government action was ruled unconstitutional, despite contemporaneous statements that the purpose of the action was secular. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. at 601 (nature and context of crèche overrode stated secular purpose of celebrating Christmas as a "national holiday"); *Edwards v. Aguillard*, 482 U.S. at 590-94 (Louisiana Legislature's stated purpose of promoting academic freedom in linking evolutionary theory and creationism was found unpersuasive, given history of religious purpose for similar prior enactments); *Wallace v. Jaffree*, 472 U.S. at 57-61 (legislative history confirmed religious purpose of statute requiring one minute for meditation or voluntary prayer); *Stone v. Graham*, 449 U.S. at 40-42 (Kentucky Legislature's "avowed" secular purpose for posting Ten Commandments in a public school was not sufficient to avoid conflict with Establishment Clause); *School Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963) (Court looked beyond stated secular purpose in scrutinizing Bible readings at the opening of the school day, considering, among other things, the manner in which the individual school administrators carried out the legislative mandate).

If it is allowed to stand without substantive review by this Court, the Tenth Circuit's ruling will have the insidious effect of permitting the advancement of religion in public schools in all but the most narrow of cases where government actors are brash enough to announce that their purpose is to promote religion. Apart from rendering the "purpose" analysis of *Lemon* a virtual nullity, the Tenth Circuit's analysis provides a road map for public school teachers to convert their lectern into a pulpit, so long as they do not simultaneously admit that their purpose is to promote or endorse religion. Such an analysis cannot be consistent with this Court's precedents or, indeed, with the very provisions and historical underpinnings of the Establishment Clause itself.

II.

THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S EFFECTS ANALYSIS, CONSTRUCTING ITS OWN, *AD HOC*, REQUIREMENTS FOR PLEADING AN IMPERMISSIBLE EFFECT UNDER THE ESTABLISHMENT CLAUSE.

In determining whether government action has the effect of advancing or inhibiting religion, *see Lemon v. Kurtzman*, 403 U.S. at 612, this Court has several times asked whether a "reasonable observer . . . aware of the history and context of the community and forum," would conclude that "a challenged governmental practice conveys a message of endorsement of religion," *County of Allegheny v. ACLU*, 492 U.S. at 630; *accord Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2455-56 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

The "reasonable observer" test asks whether a person having the general characteristics of the plaintiff and an appropriate awareness of history and context would see the challenged practices as having the effect of establishing either a particular religion or religion in general. In particular, the Court has used the "reasonable observer" test to ask whether practices that seem at first glance to endorse religion, do not do so because a reasonable observer would

conclude that they "have largely lost their religious significance over time." *County of Allegheny v. ACLU*, 492 U.S. at 631 (holding that a lone crèche at Christmas in a courthouse had *not* lost its religious significance). Furthermore, in examining the perceptions of school-age children as to whether a particular practice constituted an establishment of religion, the Court has looked to whether, "given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

As with the purpose prong, this Court has shown particular sensitivity to the impressionable nature of school-age children. "There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. at 592; *accord School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985) ("The government's activities in this area can have a magnified impact on impressionable young minds . . . .").

Ms. Bauchman's complaints allege that her public high school teacher, with the acquiescence of school authorities, sought to limit the choir class to Mormon students, [*see* A.C. ¶ 16(d)]; sought to restrict class tours to Mormon students, [*see* A.C. ¶ 17(g); C. ¶ 34]; prayed with and over students, [*see* A.C. ¶ 16(k)]; forced students to attend Mormon worship services, [*see* A. C. ¶ 16(b); C. ¶¶ 23-26, 32]; belittled religious minorities, [*see* A. C. ¶ 17(i), (k)]; used the religious content of assigned songs to preach Mormonism, [*see* A.C. ¶ 16(g); C. ¶ 19]; stated his intention to continue such advocacy despite knowing he was violating the Constitutional rights of class members, [A.C. ¶ 16(o)]; and sought to isolate minority students from class participation, rather than accommodating them [*see* A.C. ¶ 17(e)].

The Court of Appeals ruled that this conduct did not have the effect of endorsing the Mormon religion, because "a reasonable observer aware of the purpose, context and history of public education in Salt Lake City, including the historical tension between the

government and the Mormon Church," would not conclude that the alleged actions had "a principle or primary effect of endorsing religion." 132 F.3d at 555-56. According to this analysis, a "reasonable observer" might (*i*) examine the history and context of a community's dominant religion, (*ii*) decide how much of that religion he or she could reasonably expect to seep into civic and governmental matters, and (*iii*) test the challenged practice against that threshold expectation.

The Tenth Circuit's analysis turns the *Lemon* test's effects prong on its head by taking a small piece of this Court's reasonable observer analysis (awareness of history and context) and allowing it to become the analysis itself. While the Tenth Circuit's allusions to the "unique history" of the Mormon religion in the "community, culture and heritage" are somewhat opaque, the Court of Appeals appears to have converted an awareness of history that would be reasonable for an observer standing in Ms. Bauchman's shoes into a perspective so sweeping as to permit a dominant religion to dominate every aspect of the community, including the public elementary and secondary schools. The Tenth Circuit did not attempt to analyze whether the religious songs that the choir allegedly sings, the religious venues at which it allegedly performs, or the Mormon prayers their teacher allegedly recited had "lost their religious significance over time." *County of Allegheny v. ACLU*, 492 U.S. at 631. Nor did it attempt to determine whether the singing of religious songs at religious venues would be interpreted by a reasonable observer as something other than *government* endorsement of religion. *See Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. at 2456 (O'Connor, J. concurring in part and concurring in the judgment) (finding that a Christian cross placed by a private organization in a state-owned square would not strike a reasonable observer as *government* endorsement, because of the square's history as a forum for *private* expression). Utterly absent from the Tenth Circuit's analysis is any vestige of asking what the effects on a school-age child would be of the overt government action in a government-controlled forum like the school in this case.

In stark contrast with the Tenth Circuit's analysis, this Court's "reasonable observer" has never found conduct that is overtly religious and plainly government-sponsored to be permissible simply because it is consistent with the "community's culture and heritage." In fact, the Court has said just the opposite. *See County of Allegheny v. ACLU*, 492 U.S. at 603 ("[H]istory cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."); *see also id.* at 630 (O'Connor, J., concurring in part and concurring in the judgment) (reasonable observer is not required to suffer or forgive a government-endorsed religious practice "by virtue of [its] historical longevity alone"). The approach adopted by the Tenth Circuit in this case potentially exempts any action that the community has come to expect because of a particular religion's historical dominance of local culture and heritage. As a result, it requires "any given . . . observer's individual experiences and spiritual beliefs" to yield to "the community's [religious and nonreligious] culture and heritage." 132 F.3d at 555.

The potential effect of the Tenth Circuit's analysis is truly devastating. It could require religious minorities everywhere to defer to state endorsement of majority religious practices where that endorsement historically has gone unchallenged. Furthermore, it would allow a majority religion a certain leeway in public affairs wherever it could demonstrate "historical" roots in a "community's culture and heritage" and "historical tension" between itself and the government. *See id.* A "reasonable observer," for instance, aware of the history of the Quakers in southeastern Pennsylvania, would expect a certain amount of Quaker religious doctrine to invade the public schools there. Judaism would be allowed to dominate public education in certain parts of Brooklyn, while Baptists would hold sway in Rhode Island, Southern Baptists in Arkansas, Catholics in New Orleans, and Mennonites in the Upper Shenandoah Valley. Maryland schools would demonstrate a Catholic heritage while Methodists would rule in Ohio and Lutherans in parts of Minnesota. The country would Balkanize along majority-religious lines and minority children would have no choice but to be inculcated in the majority religion wherever they went to school.

This Court has never condoned using the "reasonable observer" analysis to allow state promotion of religion simply because the religion has been historically dominant and the promotion has gone historically unchallenged. Yet, uncertainty as to the role of history in Establishment Clause jurisprudence has led to inconsistent rules of decision, even within individual federal circuits. *Compare American Civil Liberties Union of New Jersey v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1996) ("history and ubiquity" are relevant to the context in which a reasonable observer evaluates a possible endorsement of religion) *with American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435, 1448 (3d Cir. 1997) (declining to impute a sense of a community's history to a reasonable observer). Certiorari should therefore be granted to determine the scope and manner of accounting for "history and context" in Establishment Clause analysis. Failure to address this important question would be to abandon this Court's specific "reasonable observer" standard and to replace it with an utterly amorphous and uncertain case-by-case accommodation of "history and context."

III.

THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S ENTANGLEMENT ANALYSIS, CONSTRUCTING ITS OWN, *AD HOC*, REQUIREMENTS FOR PLEADING AN EXCESSIVE ENTANGLEMENT UNDER THE ESTABLISHMENT CLAUSE.

In determining whether state action excessively entangles government with religion, this Court historically has analyzed whether political or other conflict along religious lines has arisen in connection with the complained-of action. *See Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 795-96 (1973); *Lemon v. Kurtzman*, 403 U.S. at 622. More recently, the Court has limited its analysis to the relationship between government and religious institutions. *See Agostini v. Felton*, 117 S. Ct. at 2015. In this context, political or other conflict constitutes evidence of governmental entanglement with religious institutions. *See Lynch v. Donnelly*, 465 U.S. at 689 (O'Connor, J., concurring).

In her complaints, Ms. Bauchman has alleged numerous examples of the kind of inter-faith strife, resulting from the actions of school authorities, that provides evidence that the school system has become overly identified and entangled with particular religious institutions. For instance, many students besides Ms. Bauchman complained of the Choir's participation in religious services, [*see* A.C. ¶ 16(o)]; Torgerson excluded dissenting students, including Ms. Bauchman, from a covert Special Tour he tried to assemble, [*see* A.C.¶ 17(g)-(h); C., ¶ 47], and attempted to "limit the Choir Class to members of [the LDS Church]," [A.C. ¶ 16(d); *see also* C. ¶ 47]. In a Choir Class lecture, Torgerson "directed the attention of the Choir Class to the fact that Rachel is a Jew" and encouraged her "ridicule and ostracism" by fellow students. [A.C. ¶ 17(k); *see also* C.¶ 36.] Most egregiously, Torgerson initiated a campaign among parents and students to "punish and ostracize those who disagreed with his advocacy of religion." [A.C. ¶ 17(d); *see also* C. ¶¶ 39-42.] As described by the district court,

> Upon receipt of a letter from plaintiff's father, Eric Bauchman, detailing plaintiff's constitutional claims, Torgerson forwarded the letter to Preston Naylor, the father of another member of the choir. Torgerson's purpose in forwarding the letter was to assist Mr. Naylor in publicizing the letter and the Bauchman's views, allegedly to engender hostility against plaintiff. The private letter from Mr. Bauchman was, in fact, publicly distributed as an attachment to a letter from Mr. Naylor to choir students' parents that criticized plaintiff and her parents for asserting plaintiff's constitutional claims. Plaintiff asserts that distribution of Mr. Bauchman's letter resulted in her being subjected to public humiliation and hostility.

Bauchman v. West High School, 900 F. Supp. 254, 261 (D. Utah 1996). Bauchman's complaints also alleged her subjection to explicit religious epithets from other students, such as "Jew bitch." [A.C. ¶ 37; *see* C. ¶¶ 36-52.] The divisiveness culminated at Bauchman's high school graduation ceremony when, notwithstanding an order from the Tenth Circuit enjoining performance of a particular religious

song, and as school teachers and administrators sat by, the song was performed by members of the choir and the audience, as Bauchman left the auditorium in tears. *See* 900 F. Supp. at 262.

This degree of civil strife certainly provides ample evidence that Mr. Torgerson, with the acquiescence of school officials, allowed his high school lectern to become a pulpit from which to promote the religious institutions in which he believes. Such proselytizing in a public school, if left unchecked, inevitably leads to an excessive entanglement of the school and the religious institutions being promoted by the teacher. If Ms. Bauchman were allowed to prove her allegations at trial, a reasonable fact-finder surely could find excessive government entanglement.

In its truncated "entanglement" analysis, however, the Tenth Circuit limited its examination "to circumstances in which the state is involving itself with a recognized religious activity or institution." 132 F.3d at 556. It then decided that having a public school class participate in Mormon worship services, "alone" and "without more" did not amount to government entanglement, *see id.*, ignoring that these activities were not alleged to have occurred "alone" and "without more," but amidst many other subtle and coercive uses of state power by Mr. Torgerson. More significantly, the Tenth Circuit completely ignored Ms. Bauchman's allegations of resulting civil strife – the key circumstantial evidence of excessive entanglement in this case.

The Tenth Circuit's overly narrow analysis ignored the effect on minorities that excess government entanglement in religion carries with it. In case after case, confronted with government entanglement in a majority religion, minority students like Ms. Bauchman are faced with an unconstitutional choice: they may acquiesce in silence, as the children did in *School District of Abington Twp. v. Schempp*, 374 U.S. at 208 n.3 (children did not ask to be excused from daily prayers in public school for fear of being "labeled as 'odd balls'" or forced to stand in the hallway during prayers, which "carried with it the imputation of punishment for bad conduct" (internal quotation marks

omitted)), or they may speak up, as Ms. Bauchman did, and suffer, with the acquiescence of school authorities, opprobrium, ridicule, insults, slurs, oppression and exclusion. This is precisely the dilemma from which this Court's Establishment Clause jurisprudence seeks to protect schoolchildren. *See Lee v. Weisman*, 505 U.S. at 593-95 (public schools may not "require[] participation in a religious exercise" that "place objectors in the dilemma of participating . . . or protesting").

Justice Blackmun, concurring in *Lee*, summarized the potential impact on students and others of excess government entanglement in religion:

> When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.

Id. at 606-607 (1992) (footnotes and citations omitted); *see also Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring) (government "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community").

The Tenth Circuit, however, ignored the dilemma facing high school students who are members of a religious minority and fashioned its own, narrow entanglement analysis in which the only question is whether West High School or its choir had directly involved themselves in religious institutions. As a result, the Tenth Circuit ignored Ms. Bauchman's allegations of strife and division along religious lines within the school community. Short of legislation specifically adopting a state religion, one must wonder what, if anything, a potential plaintiff could allege that would meet the Tenth Circuit's extraordinary requirements.

CONCLUSION

Like other areas of Constitutional analysis, the Establishment Clause gives rise to complex standards that must be applied by the lower courts. Faced with such complexities, courts must not be allowed simply to throw their hands in the air, declare the jurisprudence confused and then apply their own *ad hoc* analyses. Ms. Bauchman, as a member of a religious minority in Salt Lake City, deserves a more thorough analysis, and the protection of the Constitutional liberties of all of us demands that courts do the work necessary to apply those complex standards in all cases. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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